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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service	)	CC Docket No. 92-297

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COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA") hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry, representing owners and operators of cable systems serving more than 80 percent of the nation's more than 60 million cable households. Its members also include cable programming networks, cable equipment manufacturers and others affiliated with the cable television industry.

INTRODUCTION

In its Fourth Further Notice of Proposed Rulemaking ("Fourth Notice"), the Commission seeks further comment on whether it should impose a new cross-ownership rule to limit the participation of cable television companies in the Local Multipoint Distribution Service ("LMDS"). The Commission's central question is whether "LMDS will provide a unique and

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important new source of competition to incumbent cable ... companies,"[1] and if so, whether the agency should restrict the eligibility of a cable operator to hold an LMDS license within its cable service area. The Commission similarly inquires whether the prospect that LMDS will be a unique and important source of competition to local exchange carriers ("LECs") justifies barring LECs from LMDS.

In each case, the Commission's rationale for restriction is the possibility that either the cable operator or LEC will use the purchased spectrum "to forestall rather than promote competition."[2] The Commission specifically inquires whether incumbents have economic incentives to bid successfully in the auction process, and "warehouse" the spectrum so as to eliminate a potential video competitor.[3] At the same time, the Commission recognizes the potential advantages of permitting incumbents to bid, including the possibility of increasing auction revenues and their use of networks to deliver advanced services.

Exclusion of cable operators from LMDS bidding is premised on a "too improbable" scenario, namely that cable operators are going to spend tens or hundreds of millions of dollars to purchase LMDS licenses at auction and not offer service, in the hope that this strategy would deter a potential video competitor from entering. As explained below, marketplace realities can be relied upon to prevent this from happening. The only way incumbent cable operators will invest in LMDS is if they believe their investment in that service will earn greater returns to

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1 Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, FCC 96-297, rel. Jul. 22, 1996, at para. 125 ("Fourth Notice").

2 Id.

3 Id. at para. 130.

capital than other investments. In other words, the Commission should permit the marketplace, not misguided cross-ownership rules, to determine the level of cable's participation in LMDS.

I. MARKETPLACE CONDITIONS WILL PREVENT CABLE OPERATORS FROM "WAREHOUSING" VIDEO SPECTRUM

The premise of the Commission's proposal to exclude cable operators from LMDS bidding is bizarre. The Notice suggests if they are permitted to bid, cable operators will purchase LMDS licenses and proceed to "warehouse" the spectrum instead of putting it to a productive use. The Commission reasons that the 28 GHz band may be used by a cable competitor to deliver a competitive video service. Cable operators have no incentive to see the development of another local video competitor. If a cable operator is permitted to bid and successfully acquires a license, the operator will elect not to offer service, resulting in the elimination of a potential video competitor. Excluding the cable operator from bidding is warranted to guarantee that the spectrum does not lie fallow, and consumers are not denied the benefit of the additional video competitor. For several reasons, this scenario is unrealistic. It follows that cable operators should be permitted to bid for LMDS spectrum.

First, cable operators face significant and increasing competition in the market for the delivery of multichannel video services to residential customers. Direct Broadcast Satellite, MMDS and SMATV services are already subscribed to by more than five million customers. Projections submitted recently to the Commission's Video Competition Notice of Proposed Rulemaking show that competition will grow significantly in the coming years.[4] In addition to the terrestrial wireless and satellite-based services noted above, telephone companies are

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[4] In addition, the Satellite Broadcasting and Communications Association predicts there will be eight million direct-to-home satellite households by the end of this year. Broadcasting and Cable, Aug. 12, 1996, at 82.

expected to construct integrated broadband networks. In response, cable companies will have to invest significant resources to upgrade their networks to provide additional (and digital) capacity, to pay for the additional programming choices consumers wish to receive over the upgraded networks and to implement new technologies including the cable modem and telephone services. There are, in short, numerous competitors to cable in the video marketplace. The Notice fails to identify anything unique about LMDS that would lead one to believe that a cross-ownership bar would significantly increase competition.[5]

Second, cable operators are particularly unlikely to "invest" in the Commission's speculative "warehousing" strategy because, even if successful, it will not diminish the video competition they face. Whether or not competition from operators at 28 GHz develops, several large telephone companies have acquired wireless licenses and are actively pursuing plans to offer service in major markets Telephone companies are also pursuing longer-term plans to provide video programming, whether on a "stand-alone" basis or over integrated broadband networks. Meanwhile, AT&T, MCI-Fox and others have undertaken major DBS ventures. Even if LMDS were not to develop as an effective multichannel video competitor, cable systems will be subject to increasing competition from these and other sources powerful financial resources. These other sources will result in "effective competition" to the cable industry, as defined by Congress, in the not too distant future. The cable industry will be far too busy responding to competition from these other sources to devote scarce capital to warehousing.

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5 The Commission identifies only one factor--the large spectrum allocation of 1.3 GHz to a single licensee in each market--that allegedly makes LMDS "unique." There is no reason to conclude this large allocation will necessarily translate into unique services for consumers.

Finally, were cable operators to seek LMDS licenses, instead of "warehousing" the certain purpose would be to develop services that would earn a solid return on the capital needed to fund auction bidding and construction. This situation differs significantly from the circumstances that gave rise to the Commission's past concerns respecting warehousing. For example, the Commission was properly concerned about "warehousing" of spectrum in its 1979 Notice of Proposed Rulemaking in the Cellular proceeding. At the time, AT&T held a monopoly in local distribution over more than 80 percent of the nation's local telephone subscribers. Under consideration was a proposal to grant AT&T and other local exchange carriers a spectrum "set-aside" that guaranteed their success in the allocation process, without payment of any compensation. There was a legitimate concern that if AT&T were permitted to offer cellular service, it might not fully develop that service because cellular could eventually evolve into a competitor to residential telephone service.[6] Nonetheless, the Commission went ahead with the LEC set-aside then, believing the revenues that could be earned by AT&T in the offering of the cellular service, coupled with the limited risk that cellular would compete with wireline service, would overcome the risk of a warehousing-like strategy.[7]

Circumstances have changed dramatically since that time, making warehousing even more unlikely. There is no longer a single dominant entity possessing market power equivalent to the pre-divestiture AT&T. The success of cellular has demonstrated that the revenues that may be earned from a potentially successful service will overcome the real or imagined risk of

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6 Cellular Communications Systems, 78 FCC 2d 984, 993 (1980) ("Notice of Proposed Rulemaking"), ("[W]e question whether some potential entrants may have an incentive to restrict the supply of cellular service, or otherwise limit its potential, as a means of maintaining their investment in their other services or equipment.").

7 Cellular Communications Systems, 86 FCC 2d 469, 482-486 (1981) ("Report and Order").

"warehousing." Institution of auctions imposes a major constraint on companies that might consider such a strategy, because they are required to tie up scarce capital assets in ventures that produce no returns. And, the advent of new service alternatives means that even a capital-rich company with no more valuable use for its capital (not the cable industry) would find that its "warehousing" strategy aided its other competitors more than itself. The prospect that a cable company would bid for spectrum with the intent of "warehousing" is too attenuated to justify Commission concern.

II. EVEN IF THE COMMISSION BARS CABLE OPERATORS FROM OFFERING VIDEO PROGRAMMING SERVICES OVER LMDS CAPACITY, IT SHOULD AUTHORIZE OPERATORS TO BID FOR LMDS FREQUENCIES TO DELIVER NON-VIDEO SERVICES

Even if the Commission unwisely decides to bar cable operators from offering traditional video programming services over LMDS frequencies, it should nevertheless permit cable operators to bid for these frequencies so that they may offer other services. The contrary result, excluding cable operators from the bidding process entirely, will principally benefit the remaining bidders. They will face reduced competition in the auction process and, thereafter, in the marketplace.

In these circumstances, it is quite understandable that MCI, for example, "advocates a complete ban on LEC and MSO participation in auctions for LMDS spectrum or on the holding of an attributable interest, in any license area which overlaps any of their local telephone or cable franchise area."[8] MCI, through MCI Metro, like the cable industry, is in the process of developing plans to compete with LECs in the offering of local exchange and exchange access

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[8] Fourth Notice at para. 123, n. 7, citing Letter to Hon. Reed E. Hundt, filed May 24, 1996, from Donald F. Evans, Vice-President, Federal Regulatory Affairs, MCI Telecommunications Corporation ("MCI Letter").

services. LMDS may form an important component of this business strategy. If MCI is able to persuade the Commission to exclude cable operators (and LECs) from the LMDS bidding process, it will achieve a double win. First, it will get the potential benefit of integrated operation of LMDS and wire-based local telephone service (or the option of selecting wire and radio-based facilities in circumstances it finds most appropriate), while these opportunities are denied to its most important potential competitors. And second, having eliminated potential bidders from the auction process, MCI will benefit from the reduced auction fees that will certainly result from the elimination of potential bidders.

Moreover, the misguided rationale justifying exclusion of cable from bidding -- the elimination of a potential video competitor -- applies equally to MCI (and AT&T). The Commission is concerned that if cable systems successfully bid for LMDS licenses, they will not permit the LMDS facility to compete with the cable service, thereby eliminating a potential competitor. MCI's case for excluding cable -- to preserve a potential additional video competitor -- equally applies to MCI. Having just paid more than $600 million for a DBS license, if MCI successfully bids for LMDS licenses, is it not more than likely that MCI will use the licenses to develop its local exchange and access businesses, rather than create an additional competitor to its DBS service? As a potential provider of local telecommunications services, the cable industry stands in a position analogous to MCI. If cable operators are excluded, MCI should be too.

The same argument also applies to any LMDS applications submitted by AT&T. The company, like cable companies, has announced plans to deliver local exchange and exchange access services. It may consider delivering these services over LMDS spectrum instead of constructing wire-based facilities or leasing the capacity of others.

AT&T also has an investment in Direct TV, a provider of DBS. To protect that investment from LMDS competition, AT&T might bid for LMDS licenses with the intention of using the capacity for voice services, thereby securing its DBS investment from potential LMDS video competition. AT&T has far greater resources than the cable industry to accomplish this strategy. Furthermore, the auction resources AT&T would need to expend would be substantially less if two major classes of bidders, cable operators and LECs, are preempted from the bidding process.

NCTA does not mean to suggest that AT&T and MCI should be excluded from bidding. Rather, the bidding process for LMDS licenses should be open to all. That way, every potential bidder will be able to determine its potential uses of the spectrum, and make bids taking into account the various potential uses of its resources. The alternative of artificially restricting the bidders will result inevitably in reduced auction revenues and in fewer firms deploying resources to determine the most innovative and efficient uses of the 28 GHz band. If the Commission nevertheless decides to impose restrictions, it should merely restrict particular uses by particular entities instead of barring the entities outright from any use of the spectrum.

Finally, it is particularly important that the Commission not preempt cable operators or any other potential users when it does not know the uses to which the spectrum will be put. The Commission acknowledges that "it is not possible to determine all of the potential uses of LMDS."[9] It may turn out that a successful bidder is able to conceive and develop a service of

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[9] Id. at para. 125.

new and unexpected benefit to our information economy and society. If the Commission selectively excludes companies from auctions, the odds increase that the most experienced and motivated providers of innovative communications services will not participate in the developmental process. The risk that new services are not developed is still another factor weighing in favor of open entry into LMDS.

CONCLUSION

The Commission's policies intended to promote competition to the cable industry have been a success. More than five million subscribers take multichannel services from firms that compete with incumbent cable operators, and the number is growing. Multichannel service will be increasingly competitive irrespective of whether 28 GHz frequencies are used by incumbent cable operators and others to provide video services.

The glidepath to competition for local telecommunications services is less clear. The Commission has issued uniform national standards, but significant marketplace consequences have not yet been realized. The 28 GHz band may turn out to be an important element in the competitive telecommunications evolution. The Commission should not exclude the cable industry, an important provider of local telecommunications competition, based upon some convoluted scenario that a successful cable bid may impede video competition.

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